No. 87-746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL H. and VICTORIA D.

Appellants,

v.

GERALD D.

Appellee.

On Appeal From
Court Of Appeal Of California
Second Appellate District

BRIEF FOR APPELLANT VICTORIA D.

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QUESTIONS PRESENTED

1. Whether a child's established relationship with her biological and psychological father is a fundamental liberty interest within the meaning of the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment to the United States Constitution?

2. Whether it is a deprivation of the child's rights under the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment for a State to create and apply by way of summary judgment a conclusive presumption that a child born to a married woman is the child of her husband, where that presumption operates to terminate the child's relationship with her biological and psychological father, without regard to the child's best interests?

3. Whether it is a deprivation of the child's rights under the Due Process Clause and/or the Equal Protection Clause of the 14th Amendment for a State to deny a child continued visitation with her psychological and biological father?

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CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, is reported at 191 Cal.App.3d 995 (1987). It is reprinted in the Appendix to the Jurisdictional Statement.

Denial of Appellants' Petitions for Review by the California Supreme Court is reported at 23 California Official Reports "Minutes of Supreme Court" 9 (1987).

CONCISE STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED WITH CITATION TO STATUTORY PROVISION AND TO TIME FACTORS ON WHICH SUCH JURISDICTION RESTS

The judgment of the Supreme Court of California, denying appellants' petitions for review, was filed on July 30, 1987.

A notice of appeal to this Court was duly filed in the Court of Appeal, 2d District, Division Three, of California on October 28, 1987.

This appeal was docketed in this Court within 90 days from the judgment below. Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2). The provisions of 28 U.S.C. section 2403(b) may be applicable.

This Court noted probable jurisdiction on February 29, 1988. Pursuant to the motion of appellants, leave for an extension of time to file briefs on the merits was granted to and including May 5, 1988.

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code Section 620

The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions.

California Evidence Code Section 621

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

California Civil Code Section 4600

(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider

and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child pursuant to Section 4608:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the

pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

California Civil Code Section 4601

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

California Civil Code Section 7001

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

California Civil Code Section 7002

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Civil Code Section 7003

The parent and child relationship may be established as follows:

(1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.

(2) Between a child and the natural father it may be established under this part.

(3) Between a child and an adoptive parent it may be established by proof of adoption.

California Civil Code Section 7004

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following [1] paragraphs:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(5) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure.

This paragraph shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

California Civil Code Section 7006

(a) A child, the child's natural mother, or a man presumed to be the child's father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed after paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or parent of the alleged father if the alleged father has died or is a minor. Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017 if a proceeding has been filed under Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for,

consents to, or proposes to relinquish for or consents to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of the child or the birth of the child, whichever is later. The commencement of the action shall suspend any pending proceeding in connection with the adoption of the child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also, at his or her discretion, bring an action under this section in any case in which the district attorney believes it to be appropriate.

California Civil Code Section 7008

The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If he is a minor and a party to the action he shall be represented by a guardian ad litem appointed by the court. The natural mother, each man presumed to be the father under Section 7004, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in subdivision (f) of Section 7017 and an opportunity to be heard. The court may align the parties.

STATEMENT OF THE CASE

Carole S. and Gerald D. were married on May 9, 1976. (R 21). In the three years prior to the family evaluation, conducted between June and September of 1984, Carole

and Gerald had resided together for a total of seven months, and never longer than three months at a time. (R 215)

During the summer of 1978, Michael H. and Carole commenced an intimate relationship which continued through mid-September, 1980. (R 25) Victoria D. was born to Carole on May 11, 1981. (R 26) At the time of Victoria's birth, Carole and Victoria resided with Gerald (R 22-23). When Victoria was five months old, Gerald moved to New York, leaving Carole and Victoria in California. (R 23) In that month, Carole and Michael voluntarily participated with Victoria in paternity testing (Human Leucocyte Antigen tissue typing) at the University of California at Los Angeles. That test established a 98.07 percent probability that Michael is the father of Victoria. (R 30).

Carole, Victoria, and Carole's mother resided with Michael for approximately three months in early 1985 at Michael's home in the Virgin Islands. Carole and Victoria then spent two months with Gerald in New York. Carole and Victoria resided together for the next two months in Los Angeles. From May, 1982 until March, 1983, Carole and Victoria resided with another of Carole's male companions, Scott. (R 214). Michael served Carole with his Petition to Establish a Parent and Child Relationship in November, 1982. (R 214)

In March of 1983 the Court determined that Victoria required independent counsel, and appointed an attorney and guardian ad litem on her behalf. (A 1-6). Victoria filed a cross-complaint which contained the following language, "Both [Michael] and [Gerald] have claimed that each of them has formed a psychological or *de facto* father-child relationship with Victoria. If Victoria has one or

more psychological or *de facto* father(s) she is entitled to care, supervsion, support and rights of inheritance from said father or father(s)." The cross complaint sought:

"1. A Declaration of Rights establishing whether there exists a parent-child relationship between [Michael] and Victoria;

2. A Declaration of Rights establishing whether there exists a parent-child relationship between [Gerald] and Victoria;

3. Orders allocating responsibility for her care, supervision, (custody and visitation) and support;

4. Attorneys fees and costs for this proceeding;

5. Such other and further relief as the Court deems proper.

Carole, Michael and Victoria resumed living together as a family in August, 1983. (R 74, 85) During the period in which they resided together, Carole signed a stipulation acknowledging Michael's paternity, granting him visitation rights and acknowledging Gerald's status as a stepparent. (R 87) Before that stipulation could be signed by all parties and counsel, Carole instructed her attorney that she had changed her mind. The parties separated at the end of April, 1984, and Carole denied visitation between Victoria and Michael. (R 74-77, 85-86).

On May 10, 1984, the Court granted Carole's ex parte request for temporary restraining orders, and granted Michael's exparte request for visitation with Victoria pending a June 12 hearing on the requests of each of them for temporary orders. Carole, Michael, and Victoria's guardian ad litem stipulated to appointment of an expert to "serve the dual functions of assisting the guardian ad

litem in determining the child's best interests, and providing evidence in this matter." (A 11-13)

Pursuant to that stipulation, the parties met with Dr. Norman Stone several days before the June 12 hearing, for a preliminary evaluation. The Court adopted the recommendations of the expert, and awarded visitation rights to Michael. (A 35-40).

The order permitted Carole remove Victoria from Los Angeles, provided that she did not deprive Michael and Victoria of more than one visit with one another. That same month Carole took Victoria to New York.

Carole's failure to return Victoria to Los Angeles for visitation with Michael resulted in Carole's conviction of six counts of contempt of court. She was sentenced to serve five days in the county jail for each count of contempt. Upon the return of Victoria to the jurisdiction the sentence was suspended, and Carole was freed on probation. (A 29-34)

Almost immediately thereafter, Gerald filed his answers to the complaint and cross-complaint.

Following completion of Dr. Stone's evaluation, the matter came on again for hearing in October, 1984. Dr. Stone submitted a highly detailed and carefully reasoned family evaluation report (R 212-231), analyzing three potential family structures: Carole as primary caretaker, Michael as primary caretaker, and Carole and Michael sharing caretaking responsibilities. Sadly, he concluded that each alternative "would predispose Victoria to future emotional and social problems." (R 216)

Dr. Stone found that Victoria was attached "principally and equally" to Michael and Carole. (R 216) He concluded that "it is important for Victoria that [Michael] be permitted to remain a member of her family . . . because we perceive Michael as the single adult in Victoria's life most committed to caring for her needs on a long term basis." Dr. Stone recommended a program of visitation for the period October, 1988 through June, 1987 to be followed by a re-evaluation. On October 23, 1984, the parties entered into a stipulation incorporating Dr. Stone's recommendations.

Victoria and Michael enjoyed monthly visits under the order until the Court granted Gerald's motion for summary judgment on January 28, 1985, terminating the previously ordered visitation. Victoria's motion to compel discovery, set for the same day, was denied. (A 53-58, 61-62).

Visitation pending appeal has been denied because "The Court believes that the existence of two (2) "fathers" as male authority figures will confuse the child and be counter-productive for her best interests." (A 82-92)

SUMMARY OF ARGUMENT

California's conclusive presumption that a woman's husband is the father of her child, when applied to an established psychological parent and child relationship between a child and her biological father deprives the child of her rights to equal protection and due process of the law. Such a relationship between father and child is a fundamental one, protected by the 14th Amendment of the Untied States Constitution. A child's need for continuity in her parental relationships[1], particularly those

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[1] Societal awareness of the numbers of children who experience variant family forms is illustrated by the cartoon in which, upon receiving his report card, a child asks his teacher, "Which parent do you want to sign it: my natural father, my stepfather, my mother's third husband, my real mother or my natural father's fourth wife who lives with us?" Unger, *Herman*, Universal Press Syndicate (1983)

formed in early childhood, outweighs the state's interests in preserving the apparent integrity of the matrimonial family or protecting the child from any stigma flowing from her mother's marital status at the time of her conception.

Where a state has adopted the Uniform Parentage Act, rendering parental marital status irrelevant to the issue of the existence of the parent and child relationship, it may not exclude children born to married women from the Act. Similarly, when a state proclaims a public policy assuring children of frequent and continuing contact with both parents following separation, a state may not deprive a child of the benefits of that policy by declaring her biological and psychological father to be a stranger, and conferring paternity on her mother's husband.

Termination of an existing psychological relationship between a child and her biological father by summary judgment proceedings, prior to the completion of discovery, coupled with application of the conclusive presumption of paternity, deprives the child of procedural due process.

ARGUMENT

I. VICTORIA HAS A FUNDAMENTAL LIBERTY INTEREST IN PRESERVING HER RELATIONSHIP WITH HER PSYCHOLOGICAL AND BIOLOGICAL FATHER

A child's interest in preserving her relationship with a psychological and biological parent is a fundamental liberty interest within the meaning of the Fourteenth Amendment to the United States Constitution.[2] The

[2] At issue is Victoria's right to receive from Michael "the training, nurture and loving protection that are at the heart of the parental relationship protected by the Constitution." *Riviera* v. *Minnich*, ___ U.S. ___, 107 S.Ct. 3001, 3004 (1987).

right to preserve parent and child relationships is second only to the right to liberty in its impact on the lives of parent and child.

California's conclusive presumption that, except under certain defined circumstances, a married women's husband is the father of her child acts to protect a limited number of marital relationships at the expense of children's actual relationships. In this case California has sacrificed Victoria's biological and psychological relationship with Michael to protect the apparent[3] integrity of the marriage between Carole and Gerald. In so doing, it rejected a functional analysis of the family and adopted a romanticized[4] but unrealistic view of the family.

This Court has recognized that the constitutional rights of children need to be assessed and applied with particular sensitivity and flexibility:

> A child, merely on account of his minority, is not beyond the protection of the Constitution . . . . The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore* v. *East Cleveland*, 431 U.S. 494, 503-504 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitution rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their

[3] Had the parties actually practiced marital fidelity, this circumstance would not have arisen.

[4] ". . . [E]very parental generation has some belief in a golden age of family stability." C. Hoover, "Practical Considerations" in Reiss and Hoffman, *The American Family: Dying or Developing?*, (1979) at 37.

> inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Belloti v. *Baird*, 443 U.S. 622, 633-634, 99 S.Ct. 3035, 3043 (1979).

The child-parent relationship is fundamental because the nature of child-rearing in one generation significantly shapes the nature of the society in the next.[5] Thus family and society bear a reciprocal relationship to one another. While scientists may work forever to ascertain the ratio in which nurture versus nature determines individual characteristics, no one in modern society denies the significant role played by nurture. Thus one of the most significant ways in which citizens in pluralistic society may exercise their freedom and contribute to the society's development is child-rearing.[6] One's personality, values

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[5] [T]he family—as we recognize it today—is not a self-enclosed entity. It is a personification of the strong and often practical requirements of a complex society. It also serves to express the very human and ethical aspirations of its members. The family as an agent of practical society falls *victim* to political and economic forces, but as the agent of the best human hopes, it is our *agent for changing* social form and custom. Reiss and Hoffman, *The American Family: Dying or Developing?* 4 (1979)

[6] "Tocqueville . . . sensed that the family somehow exemplifies the restructuring and redefinition of boundaries in a democratic society. His major concern, it should be stressed, was how the irresistible movement toward equality could be "civilized," so to speak, by a voluntary acceptance of various restraints and limits. And such voluntary acceptance, in Tocqueville's view, depended on the nature and the future of the family.

"Tocqueville's great insight, which was in no way diminished by his bias or his factual error, is that the historical drift toward equality impinges on boundaries of every kind: psychological, social, political, religious, and territorial. Not only is the family itself shaped by the trend toward equality of condition, but it is at once a key source, amplifier, and stabilizer of eqalitarian aspirations, of individualism, and of the restless pursuit of success.

D. Davis, "The American Family and Boundaries in Historical Perspective" in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra*. at 20.

and capacity to contribute to the community are substantially influenced by the character of one's childhood family experiences. Both individuals and society have a vital interest in protecting children's family relationships. Those interests diverge only when state intervention is essential to protect the child from harm. See *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944). Governmental preference for a particular family form may also, indirectly, reflect enthocentricity and class bias.[7]

> We have believed in this country that this process [childrearing], in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.

Belloti v. *Baird*, *supra*., 433 U.S. at 638, 99 S.Ct. at 3045.

Families are multidimensional—depending upon one's focus the family is a natural (biological), psychological, social, religious, or economic entity. Families are also dynamic.[8] Family composition frequently changes[9] dur-

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[7] See A. McQueen, "The Adaptations of Urban Black Families: Trends, Problems, and Issues" in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra*. at 79.

[8] "Families are dynamic institutions with continuously changing membership, functions, and needs over time."

P. Moen, "The Two-Provider Family: Problems and Potentials" in *Nontraditional Families: Parenting and Child Development* 13, 33 (M.Lamb, ed. 1982).

[9] "individuals move continuously in and out of these family forms. M. Sussman, "Actions and Services for the New Family," in *Reiss and Hoffman*, The American Family: Dying or Developing?, *supra*. at 219.

ing the years of childhood. A child may spend portions of his or her childhood in a marital or nonmarital nuclear family, a single-parent family, a blended (step-parent) family[10], an extended family, one or more foster families, and an adoptive family. Moreover the substantial percentage of children at any given time who do not live in a single household with their two biological parents, may in fact be members of two households under a joint custody or visitation plan, or may enjoy stepparent visitation with a parent's ex-spouse. By definition, those children and parents who come before courts for the adjudication of parental rights and responsibilities represent the substantial portion of Americans whose family structure does not conform to the nuclear family model. Rather than trying to force such families into stereotypical roles, the State should support the functioning parent and child relationships which have developed.

The "traditional" family, comprised of a married couple and their biological children is no longer, and may never have been the dominant family form.[11] Seven years ago,

[10] Census figures show that approximately 80 percent of divorced persons remarry. U.S. Bureau of the Census, Current Population Reports, Special Studies Series P-20, No. 312, *Marriage, Divorce, Widowhood and Remarriage by Family Characteristics: June 1975*, (1977) at 8-10.

[11] "Social scientists have speculated about and researched parental and family influences on child development for many decades. As sociopolitical philosophies have changed with time, so too have the assumptions and recommendations of social scientists. One assumption has remained consistent, however: the notion that the "ideal family" contains a primary caretaking and housekeeping mother, and a breadwinning father. Consequently, analyses of the family have consistently portrayed this traditional constellation as the most appropriate context in which to raise children. As a result, any and every deviation from "the norm" is usually considered briefly and disparagingly.

"Even today, the traditional family is frequently recalled romantically and nostalgically by those who bemoan its demise. Demographers, however, doubt that traditional families were ever as common as these Cassandras imply and social scientists question whether the decline of the nuclear family can legitimately be viewed as the cause of the contemporary social malaise. Certainly the traditional family is far from being today's norm, but unfortunately, little reliable evidence regarding the effects of 'deviant' family styles was available until recently."

M. Lamb, Preface, in Nontraditional Families: Parenting and Child Development ix. (M. Lamb, ed. 1982).

almost one third of all children did not live in a nuclear family unit (mother, father and their biological children).[12] The trend away from the traditional family is

[12] About 68 percent of children lived with both *biological* parents in 1981 (based upon the National Health Interview Survey), 7 percent with their biological mother and stepfather, and 2 percent with their biological father and stepmother. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 150, *Population Profile of the United States: 1984-1985* (1987) 23 n.7. Presumably the remaining 23 percent resided in foster care, adoptive homes, with relatives, or with unrelated families (persons in institutional care were excluded from the survey).

It is more difficult to conclude from population studies what percentage of children will live with both biological parents for their entire childhoods. Each year five out of every one thousand marriages end in divorce. *Id.* at 22 "One of the most significant changes in family composition over the past 15 years has been the substantial growth in the number of one-parent situations. Single parents accounted for 26 per cent of all family groups with children under 18 years old in 1985, a proportion twice as large as in 1970 . . . The proportion of single parents who are mothers who have never been married has increased dramatically from about 7 percent in 1970 to 25 percent in 1985 . . . . Divorced mothers constituted about 37 percent of the persons maintaining one parent groups, significantly higher than their 29-percent share in 1970 . . . Fathers maintained about 12 percent of the one-parent groups in 1985." U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 411, *Household and Family Characteristics: March 1985* (1986) 9-10.

It is reasonable to assume that when Michael came to Victoria's nursery school to exercise visitation, no one found the situation particularly remarkable. A substantial number of Victoria's class-

expected to continue.[13] One expert predicts that forty percent of all children will live in variant family forms by 1990.[14] Given the phenomenon of family pluralism, insistence on a particular family form may be destructive rather than constructive.[15]

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mates are likely to live in single parent households or stepfamilies and to maintain visitation arrangements with other parental figures.

[13] "Some of the compelling modifications of family in America initiated during the 1970s have been projected as continuing into the 1980s (Masnick & Bane, 1980). It is anticipated that one-third of all children born during the '70s will be spending part of their childhood living with a single parent. Only one-quarter of all American households will be conventional ones, if "conventional" is defined as including mother, father, and children. Thirteen separate types of households will eclipse in numbers the conventional units. Most of our understanding of the ways children in families are socialized is derived from studies of conventional two-parent nuclear units. However, because Bureau of Census data are "eliminating the typical family," as reported in one announcement (Peirce, 1980), normative data on values and practices relevant to child development in family variants are essential in order to assess the implications for the child who grows up in a variant family form."

Eiduson, Kornfein, Zimmerman and Weisner, *Comparative Socialization Practices in Traditional and Alternative Families* in Nontraditional Families: Parenting and Child Development 315, 336 (M. Lamb, ed. 1982).

[14] Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. Issue No. 4, at 170, 171, Table 1 (1979).

[15] ". . . [P]luralism in family structures reflects variations in the racial, ethnic, religious, and age groups that compose the American salad-bowl culture. Each of these forms, because they are so different from one another, has varied problems to solve and issues to consider when dealing with organizations and institutions and its own internal family relationships. Most important, variant family forms have different needs from the traditional nuclear family for outside services and supports, which for the most part remain unmet in the United States today.

"Until recently, we have used an idealized family form—the single-breadwinner, intact family—on which to base our public policies and programs, ignoring or deprecating other family forms which differ from this "ideal" type." M. Sussman, "Actions and Services for the New Family," in Reiss and Hoffman, *The American Family: Dying or Developing?*, *supra*. at 227. Sussman points out that governmental policies based upon the idealized family form may actually destroy functioning family systems.

Yet children require preservation and protection of their parental relationships which withstands changes in the family's form.[16] When the state engages in the legal fiction that the mother's husband is the child's father, it offers no guarantees that the mother's husband will remain a permanent fixture in the child's life. The record here reflects substantial periods in Victoria's early years in which Gerald took no action to ensure the continuity of her relationship with him. By contrast, Michael has engaged in a continuous effort to establish and protect his relationship with Victoria. The Court's expert found him to be the single adult in Victoria's life most committed to caring for her needs on a long term basis. (Jur. St., at 13).

What is important for children is that the persons with whom they establish the psychological parent-child relationship, remain active participants in their rearing. Preservation of the illusion of a nuclear family is less beneficial than preservation of children's actual attachments.

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[16] "Vigorous debate rages over how a child develops, what is in a child's best interests, and how to achieve certain objectives on behalf of a child. Near consensus does exist, however, for the principle that a child's health growth depends in large part upon the continuity of his personal relationships. When divorce, death of a parent, foster care, or adoption intrude on a child's family life, such continuity is inevitably interrupted. Although some children may not experience lasting emotional or social harm from these crises, and some children may even benefit from them eventually, it seems reasonable to adopt as an operating principle the notion that a break in family continuity is detrimental to a child." Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 902.

Loss of a parent with whom a child has formed a significant attachment[17] has serious long-term developmental consequences.[18] While the state cannot guarantee that

[17] Here the Court's expert found that Victoria's attachment to Michael was as strong as her attachment to her mother. (Joint Appendix 212-231).

[18] ". . . [A] reliable early attachment is vitally important to healthy development, the cost of breaking that crucial bond—the cost of separation—may be high . . . . . [W]hen separation imperils that early attachment, it is difficult to build confidence, to build trust, to acquire the conviction that through the course of our life we will—and deserve to—find others to meet our needs. And when our first connections are unreliable or broken or impaired, we may transfer that experience, and our responses to that experience, onto what we expect from our children, our friends, our marriage partner, even our business partner.

"Expecting to be abandoned, we hang on for dearest life: 'Don't leave me. Without you I'm nothing. Without you I'll die.'

"Expecting to be betrayed, we seize on every flaw and lapse: 'You see—I might have known I couldn't trust you.'

"Expecting to be refused, we make excessive aggressive demands, furious in advance that they will not be met.

"Fearful of separation, we establish what Bowlby calls anxious and angry attachments. And frequently we bring about what we fear. Driving away those we love by our clinging dependency. Driving away those we love by our needy rage. Fearful of separation, we repeat without remembering our history, imposing upon new sets, new actors and a new production our unrecollected but still so-potent past.

"For no one is suggesting that we consciously remember experiences of early childhood loss . . . What stays with us instead is what it surely must have felt like to be powerless and needy and alone. Forty years later, a door slams shut, and a woman is swept with waves of primitive terror. That anxiety is her "memory" or loss.

"Loss gives rise to anxiety when the loss is either impending or thought to be temporary. Anxiety contains a kernel of hope. But when loss appears to be permanent, anxiety—protest—gives way to depression—despair—and we may not only feel lonely and sad but responsible ("I drove her away") and helpless ("I can do nothing to bring her back") and unlovable ("The is something about me that

parents will be motivated to continue their parental relationships through the family's shifting forms, it should not preclude the preservation of those actual relationships in favor of a formal classification which is of secondary importance to children.

The California Legislature has recognized the importance of continuity of parental relationships. Civil Code

makes me unworthy of love") and hopeless ("Therefore I'll feel this way forever!).

"Studies show that early childhood losses make us sensitive to losses we encounter later on. And so, in mid-life, our response to a death in the family, a divorce, the loss of a job, may be a severe depression—the response of that helpless and hopeless, and angry child.

"Anxiety is painful. Depression is painful. Perhaps it is safer not to experience loss. And while we may indeed be powerless to prevent a death or divorce—or our mother from leaving us—we can develop strategies that defend us against the pain of separation.

"Emotional detachment is one such defense. We cannot lose someone we care for if we don't care. The child who wants his mother and whose mother, again and again and again, isn't there, may learn that loving and needing hurt too much. And he may, in his future relationships, ask and give little, invest almost nothing at all, and become detached—like a rock—because 'a rock, 'as a sixties song tells us, 'feels no pain. And an island never cries.'

"Another defense against loss may be a compulsive need to take care of other people. Instead of aching, we help those who ache. And through our kind ministrations, we both alleviate our old, old sense of helplessness and identify with those we care for so well.

"A third defense is a premature autonomy. We claim our independence far too soon. We learn at an early age not to let our survival depend upon the help or love of anyone. We dress the helpless child in the brittle armor of the self-reliant adult.

"The losses we have been looking at—these premature separations of early childhood—may skew our expectations and or responses, may skew our subsequent dealings with the necessary losses of our life . . . Loss can dwell within all of our life.

J. Viorst, "The High Cost of Separation", *Necessary Losses* (1986).

Section 4600 begins by declaring: "The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of childrearing in order to effect this policy." This policy is phrased in terms of the child's rights, not those of the parents. By the simple but cruel expedient of defining Michael as a stranger rather than a parent, the state has deprived Victoria of the protections it affords to other children. California's statutory scheme required Carole's marital status at the time of conception to be the sole determinant of Victoria's paternity, absent Gerald's formal rejection of the role, or concerted effort by Carole and Michael to establish Michael's paternity. This Court has held that

> . . . a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally . . . . there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust." (Citation omitted.)"

Gomez v. *Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875 (1973).* By denying her right to frequent and continuing contact with Michael, California has violated Victoria's due process and equal protection rights.

This Court, in a variety of contexts, has been called upon to explore which family relationships between parental figures and children are entitled to constitutional protection, and the nature and extent of that protection. The cases themselves reflect the variety of family relationships which children experience and the tensions which arise from an effort to make decisions which will shape children's lives, based upon the facts as they exist at

a particular moment in time and based upon a concept of parenthood as an exclusive status.

> [T]he child's need for continuity in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or (set of parents) . . . . Current research demonstrates that even if nuclear families are best for children, when children form parental relationships outside of the nuclear family they often lose more from the law's enforcement of exclusive parental relationships than they gain.

Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 882.

Victoria and Michael's psychological and biological father-daughter relationship is entitled to substantive and procedural due process protection. In *Smith* v. *Association of Foster Families*, the Court recognized that fundamental liberty (431 U.S. 816, 97 S.Ct. 2094 (1977)) interests arise between a psychological parent and child, but found that in the case of foster families, such interests are secondary to those of the natural family. Victoria's relationship with Michael is founded upon both psychological and biological bonds. California has erroneously concluded that such interests must be secondary to those of the marital family.

Stepparent adoptions provide the closest analogy to the facts of this case.[19] Cases involving stepparent adoptions

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[19] As a presumed father under Civil Code Section 7000 et. seq. Michael's consent or an action to declare Victoria free from his custody and control would have been necessary prior to a stepparent adoption. Under California Civil Code Section 232 Michael's parental rights could have been terminated only upon proof of abandonment, failure to support or communicate, cruelty or neglect, alcohol or

have led to varying analyses. The Court has found that gender-based discrimination invalidated a statutory scheme prohibiting the natural father from a right to veto a stepparent adoption while granting that right to natural mothers. (Unlike the statute reviewed here, the natural father's rights could be terminated under the invalid statutory scheme only where such termination was found to be in the child's best interests.) *Caban* v. *Mohammed*, 441 U.S. 391, 99 S.Ct. 1760 (1979).[20]

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drug-related disability or moral depravity, felony conviction, developmental or mental disability or mental illness, failure to maintain adequate parental relationship, or child abuse.

Although it made no pragmatic difference in Victoria's life or in her actual relationship with Michael, Carole's marital status at the time of Victoria's conception shifted the standard of proof necessary to terminate the relationship between Victoria and Michael from clear and convincing evidence of one of the circumstances set forth above to a conclusive presumption that no relationship may exist.

[20] One year earlier, the constitutional challenge of a father who had enjoyed visitation with his son was rejected, in favor of a stepparent adoption which gave "full recognition to a family unit already in existence, a result desired by all involved except appellant." (Interestingly, the opinion noted that like many children so situated, the 11-year-old boy in this case wanted to continue visits with his biological father, while simultaneously establishing a legal relationship with his stepfather. The stepparent adoption cut off the child's right to continued visits with his biological father, while not having a substantial impact on his daily life in the new family unit.)

The Court's effort to distinguish the father's position from that of a divorced father who had exercised visitation is unpersuasive. Rather than identifying the factors which distinguish the two situations, the Court stressed that the father did not seek custody of the child and therefore had not exercised substantial parental responsibility. The logical societal consequence of such reasoning would be an increase in biological fathers seeking custody of children regardless of their best interests out of fear that otherwise their relationships might be abruptly terminated once a stepfather entered the picture. Moreover, the dividing line between custody and visitation has become less distinct over time with the growing acceptance of joint custody

In *Lehr* v. *Robertson*, 463 U.S. 254, 258, 103 S.Ct. 2985, 2991 (1983), while upholding a stepparent adoption over the natural father's objections, the Court explored the significance of varying aspects of the father—child relationship, recognizing at one point that "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." The Court saw paternal biological ties as the source of opportunities rather than rights.[21] While a biological mother could leave the children in the care of others without surrender of her rights, actual assumption of the role of fatherhood was treated as a necessary prerequisite of constitutional protection. The Court viewed rights to seek protection of the father-child relationship as emerging only when a biological father also assumed parental responsibility, ignoring the fact that the father and child's opportunities to form a relationship might be effectively impeded or barred by the mother. Under the reasoning of *Lehr*, Victoria's relationship with Michael is entitled to

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arrangements, and replacement of the old language of custody and visitation with "parenting plans" which allocate responsibility for the child's daily care and supervision. (See, for example, California Civil Code 4600.5) *Quilloin* v. *Walcott*, 434 U.S. 253, 98 S.Ct. 549 (1978). The Court's insistence upon viewing families as units rather than dynamic entities comprised of changing relationships led to this unfortunate result.

[21] "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." (*Lehr, supra*, 463 U.S. 262, 103 S.Ct. 2993-2994).

protection, as Michael has assumed all of the responsibilities of fatherhood with respect to Victoria, whenever it has been in his power to do so.

California's statutory scheme denies that choice to natural fathers, where the mother is married and cohabiting with her husband at the time of conception (unless, within two years after birth, the mother joins with the natural father in seeking blood tests to establish his paternity). Here, until protected by the Court's pendente lite visitation orders under Civil Code Section 4601, Victoria and Michael's opportunities to enjoy their relationship with one another were entirely dependant upon the vagaries of Carole. When Carole's romance with Michael flourished, Michael was "Daddy" to Victoria. When Carole enjoyed conjugal harmony with Gerald, he acted as Victoria's "Poppa."

In the few years encompassing her early childhood, Victoria's family structure altered frequently. Although the Court had previously found preservation of her relationship with Michael to be in Victoria's best interests, Evidence Code Section 621 deprived the Court of discretion to consider the child's best interests. By granting Gerald's motion for summary judgment, and denying Victoria's request for visitation under Civil Code Section 4601, the state brutally removed Michael from Victoria's daily life.

"[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." *Lehr, supra.* 463 U.S. 266-267, 103 S.Ct. 2997. Victoria contends that a statutory scheme which ignores her attachments and her best interests is constitutionally defective. To the extent that the rights of

a biological father and child are conditioned upon the formation of an attachment between them, the Court discourages the information of such attachment by rewarding mothers who deny fathers access to the child with control over the child's future.

In *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1971) this Court rejected a state statute which freed children for adoption by third parties by presuming unwed fathers to be unfit parents. The state law was defective because, "Under the statute . . . the nature of the actual relationship between parent and child was completely irrelevant." *Lehr* v. *Robertson, supra.* 463 U.S. 258, 103 S.ct. 2992. California Evidence Code Section 621 is similarly defective.

This case does not represent the clash of two sets of fundamental interests. The actual marital relationship of Carole and Gerald was not threatened by the judicial determination that Michael and Victoria are father and daughter. Whether Carole and Gerald maintain their marriage is a matter within their sole discretion. Nor does Gerald have a constitutionally protected right to be recognized as the father of any child his wife may bear. By contrast, Victoria will have no choice as to which relationships she maintains until she reaches adulthood. Only through judicial protection of her relationship with Michael may she retain its benefits, absent another change of heart on the part of Carole.[22]

Termination of an existing psychological and biological relationship cannot be justified by the public policy which

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[22] It is, of course, Carole's changes of heart which created this dilemma in the first place. Sadly, Carole, Gerald and the California Courts have failed to recognize Victoria's right and need for emotional attachments which do not merely mirror those of her mother.

favors marital relationships.[23] Marriages have traditionally been protected because they provide some guarantee of commitment and continuity in childrearing. Here protection of the fiction of marital fidelity deprived the child of continuity in her relationship with Michael and encouraged her to forget, or deny that the family relationships she had enjoyed in her early childhood had ever occurred.[24]

The destruction of the relationship between Michael and Victoria was not essential to the protection of the relationship between Gerald and Victoria. Should the marriage between Carole and Gerald end, Gerald may seek stepparent visitation. By contrast, whatever changes in the family form may occur, Victoria will only have an opportunity to enjoy her relationship with Michael should Carole and Gerald soften in their insistence upon Michael's exclusion from Victoria's life.

Protection of the integrity of the marital family, while a worthy goal in the abstract, breaks down in the face of the child's need for preservation of her parental relationships. That a father is married to another never interferes with the rights of father, child, mother, or state to seek establishment of the parent and child relationship. Yet surely his marriage would be equally threatened by the revela-

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[23] See *Smith* v. *Association of Foster Families*, *supra*. at 433 U.S. 843-844, 97 S.Ct. at 2109, recognizing that the marriage relationship is important because of the role it plays in promoting a way of life through the instruction of children.

[24] In his dissenting opinion in *Rivera* v. *Minnich*, *supra*, ____ U.S. ____, 107 S.Ct. at 3008, Justice Brennan noted, "In such cases what I wrote over 35 years ago is still true: 'in the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.' *Cortese* v. *Cortese*, 10 N.J.Super. 152, 156, 76 A.2d 717, 719 (1950)."

tion that he had fathered a child extramaritally. Similarly, the integrity of the marital family is certainly threatened by husband's rejection of parental status within the first two years after the child's birth, or by the concerted action of the mother and biological father within the two-year period.

II. APPLICATION OF EVIDENCE CODE SECTION 621 DEPRIVED VICTORIA OF HER RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

California Evidence Code Section 621 is a legislative anomaly which survived the adoption of the Uniform Parentage Act. While California Civil Code Section 7002 proclaims that, "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents," Section 621 attaches profound significance to the mother's marital status.

California's Supreme Court has identified the following factors as the public policies underlying Evidence Code Section 621:

1. Preservation of the integrity of the family unit;

2. Encouragement of marriage;

3. Promotion of child welfare by ensuring adequate support;

4. Insurance of the stability of titles and inheritance;

5. Protection of the child from traumatic changes in family structure.

Estate of Cornelious, 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984); *In re Lisa R.*, 13 Cal.3d 636, 119 Cal.Rptr. 475

(1975); *Michelle W.* v. *Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1986).

As applied here, the presumption did not serve any of those goals. A public policy which protects family integrity requires the protection of functioning familial relationships not formal structures. Marriage could not be encouraged here since marriage between Michael and Carole was impossible in view of Carole's marriage to Gerald. Nor was the marital relationship between Carole and Gerald destroyed by the revelation of Carole's infidelity. The state's policy in favor of ensuring the economic support of children was not served, since both Michael and Gerald have, and have announced their intention to continue to, contribute to Victoria's support. In fact, had Michael and Victoria prevailed, more money would have been available for Victoria's support as Michael would have made child support payments to Carole and would have contributed directly to Victoria's support when she was in his care. Similarly, once an adjudication of paternity is made, rights of inheritance will be clarified. Moreover, Gerald and Michael remain free to provide for Victoria by will. Most importantly, application of the statute did not protect the child from traumatic changes in family structure. Rather, application of the statute created a traumatic change in family structure.

None of the asserted state interests are sufficiently strong to outweigh Victoria's and Michael's interests in the preservation of their relationship with one another.

The California appellate court found that Victoria and Michael's interests in preserving their relationship are "outweighed by the state's interest in upholding the integrity of the family." (Jur.St. B15, B17). The family which the Court found most worthy of protection is the matri-

monial family, citing *Kusior* v. *Silver*, 54 Cal.2d 603, 619, 7 Cal. Rptr. 129, 140 (1960).[25] The Court of Appeal provides no analysis of why the state's interest in the matrimonial family ought to outweigh its interest and that of the child in promoting healthy development by protecting the continuity of established parent-child relationships. Nor does *Kusior* shed any light on those reasons.[26]

Had Michael been married, and Carole unmarried at the time of Victoria's conception, no court would have held that Victoria and Carole could not establish Michael's paternity.[27] Yet such an action would have impugned the

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[25] "[T]here are significant reasons why the integrity of the family when husband and wife are living together should not be impugned."

[26] In *Kusior* the child was born nine days after entry of the final judgment of dissolution of marriage. The husband sought to avoid responsibility for child support by denying paternity, despite visits to wife during the separation. No putative father came forward seeking to establish a relationship with the child. Under today's version of the statute, Mr. Silver would have been entitled to seek blood tests to deny paternity. Since the child in *Kusior* had no relationship with any father, there was no interest to balance against the abstract integrity of the already dissolved marriage. The state's true interest in *Kusior* was ensuring that the child would be supported.

[27] The marital status of the putative father is irrelevant when the State, mother or child seek to establish paternity in order to obtain child support. See *Rivera* v. *Minnich*, *supra*. ____ U.S. ____, 107 S.Ct. at 3004, in which the issue of paternity is characterized as "Resolving the question of whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father . . ." Yet, as Justice Brennan recognizes in his dissent, once established, an adjudication of paternity will lead to the entire panoply of parental rights and responsibilities, "The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assume a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a well-spring far more profound than legal decree. Some

integrity of Michael's matrimonial family. Similarly, the statute grants the husband a two year period in which he may impugn the integrity of the matrimonial family and thus escape child support obligations, even if no putative father has identified himself. The mother and the putative father may conjointly challenge paternity and impugn the matrimonial family, even if the wife chooses to remain in the marriage. Thus if the state's true aim is to protect marriages, Evidence Code 621 is a particularly crude tool.

The reality is that monthly weekend visits between Michael and Victoria would have little or no effect on the marriage between Carole and Gerald. A marriage that would founder as a result of such visits has a very weak foundation and is unlikely to survive the other vicissitudes of daily life.

Application of Evidence Code Section 621 may withstand scrutiny in cases like *Kusior*, where no putative father is on the scene and thus there are no competing interests to the state's goal of ensuring economic support for children.[28] The most appropriate context for applica-

men may find no emotional resonance in fatherhood. Many, however, will come to see themselves far differently, and will necessarily expand the boundaries of their moral sensibility to encompass the child that has been found to be their own. The establishment of a parental relationship may at the outset have fewer emotional consequences than the termination of one. It has, however, the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime." *Id.* at 107 S.Ct. 3007

[28] In those cases where there was no biological father seeking to establish a relationship, courts have had no difficulty preventing the belated attempts of fathers to deny paternity and avoid support obligations. *Hess* v. *Whitsitt*, 257 Cal.App.2d 552, 65 Cal.Rptr. 45 (1968); *SDW* v. *Holden*, 275 Cal.App.3d 313, 80 Cal.Rptr. 269 (1969); *Keaton* v. *Keaton*, 7 Cal.App. 3d 214, 86 Cal.Rptr.562 (1970).

tion of the presumption are marriages of some duration, in which husbands and wives, seeking to avoid the constraints of no-fault marital dissolutions, in the heat of their anger throw into question the paternity of children who have well-established relationships with the husbands. In such cases, no putative father has come forward. California's Court of Appeal has found that the purpose of the two-year statute of limitations for motions for blood tests is to preserve psychological relationships. In *Marriage of Stephen B. and Sharyne B.*, 124 Cal.App.3d 524, 177 Cal.Rptr. 429 (1981) the court rejected the argument of a husband that the two-year statute of limitations was discriminatory. The court held that by age two a child reared in an intact marriage has established a psychological parent and child relationship with the husband which outweighs the biological relationship,

> A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved and upon which liability for continued responsibility to the child might be predicated. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity . . . Where a strong social relationship to the child has not yet developed, the only basis for a duty on the husband's part to support the child is biological fatherhood of the child.

Id. 124 Cal.App.3d at 530-531, 177 Cal.Rptr. at 433, citing Recent Developments, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 Stan. L.Rev. 754 (1968) (*Tangled Web*).

The rationale for the conclusive presumption has shifted, as courts try to uphold it in the face of social and scientific change. This history was summarized by the

Court of Appeal in *Marriage of B., supra.* 124 Cal.App.3d 528-531, 177 Cal. Rptr. 431-433:

> Early California cases were able to justify the conclusive presumption in question on the ground that no competent evidence could be adduced to indicate who among those who had intercourse with the wife during the period of possible conception was the biological father of the child born to her. However, as blood tests became scientifically reliable so that they could exclude a husband as the biological father, the court's [sic] sustained the legislative mandate by unabashedly calling it a substantive rule of law. . .
>
> The Legislature, at least prior to the amendment, used this conclusive presumption fiction for three public policy reasons, namely, (1) preservation of the integrity of the family; (2) protection of the innocent child from the social stigma of illegitimacy; and (3) a desire to have an individual rather than the state assume the financial burden of supporting the child. The Legislature, by its 1980 amendment to section 621, has recognized that blood tests are now reliable evidence on the issue of paternity. The conclusive presumption, however, has been retained subject to what amounts to a two-year statute of limitations on a husband's right to introduce such evidence.

The court concluded that the statute of limitations was enacted in response to *Tangled Web's* reasoning and its substitution of the psychological attachment for the prior rationales.

Until *Michael H.* California's Court of Appeal and Supreme Court applied Evidence Code 621 in a fashion which was protective of existing, functioning parent and child relationships.

In *Estate of Cornelious* 35 Cal.3d 461, 198 Cal.Rptr. 543 (1984), an adult child sought to claim under her biological father's estate. The California Supreme Court held,

"The due process clause does not compel a holding equating the natural urge to look after one's flesh and blood with the equally natural but somewhat baser, impulse to take care of property one's biological father has failed to dispose of by will." The court noted that the adult child had grown up enjoying a psychological parent-child relationship with her mother's husband which outweighed the significance of the biological connection."

By contrast, in *Lisa R.*, 13 Cal.3d 636, 119 Cal.Rptr. 475 (1975) the California Supreme Court held that application of the conclusive presumption violated the father's due process rights under the Fourteenth Amendment. The biological father had established a psychological parent and child relationship with Lisa, which was interrupted by the mother's conduct. In dependency court proceedings, the biological father came forward and re-established his relationship with Lisa. Following the deaths of the mother and her husband, the state sought to free Lisa for adoption over the objections of her natural father. Citing *Stanley, supra.*, the Court held that "The question whether appellant, as one claiming to be Lisa's natural father, can rebut the presumption that Lisa is the issue of her mother's marriage must be resolved by weighing the competing private and state interests."

The Court accorded substantial weight to the actual facts surrounding Lisa's relationship with her natural father finding that by having lived with Lisa and contributing to her support the natural father's interests transcended those whose ties are purely genetic. While the state has an interest in a child's welfare, that interest is not defeated by preventing a putative father from offering evidence of his paternity. The Court disregarded the state's interest in ensuring the legitimacy of children, noting that the putative father undoubtedly intended to

legitimate the child. Here there was no marital family threatened, as the mother and her husband had died. Nor was the speedy resolution of disputes an adequate justification.

Application of the presumption served to preserve an established relationship in *Vincent B.* v. *Joan R.* 226 Cal.App.2d 313, 179 Cal.Rptr. 9 (1981). There a biological father sought to establish paternity when the mother cut off his access to the child seven years after birth. Although the biological father had been a frequent visitor, nothing in the opinion suggests that he had been introduced to the child as his father, and established a psychological parent and child relationship. Mother and her husband had divorced when the child was four years old. Application of the presumption served to protect the seven-year-old psychological relationship with the mother's husband.[29]

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[29] The Court's reasoning that visitation with the biological father under Civil Code Section 4601 should be denied underestimates the capacity of children to manage multiple parental relationships. See *Rethinking Exclusive Parenthood*, *supra*. 70 Va. L. Rev. at 909-911, ". . . [R]ecent research does not bear out the conclusion that severing relations with parents or caretakers will resolve a child's loyalty conflicts. In fact, loss of contact with absent parents is more likely to aggravate those problems. Children of divorce who do not maintain contacts with their noncustodial parents suffer harm at every developmental stage; those who maintain ties with noncustodial parents adjust more easily to their new situations. Similarly, children in foster care who remain in contact with their parents experience fewer cognitive and psychological problems than do children whose bonds with their parents are completely severed. This is because a child's commitments to his past are a source of stability despite the instability of the family relationship. If his current placement is stable, contacts with former parents or caretakers are unlikely to confuse him as to the permanence of his new family unit and may be necessary to help resolve conflicting loyalties. With help from his foster parents he can learn to draw strength from the multiple

Existing relationships were preserved by application of the presumption in *Michelle W.* v. *Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748 (1985). There the child's mother divorced her husband and married the biological father, who thus became a member of the child's household. Child (who did not have independent counsel) and biological father sought to eliminate the husband's visitation rights by establishing biological father's legal paternity. In upholding the trial court's application of Evidence Code 621, the California Supreme Court stressed that Michelle and her biological father were not threatened with the loss of their relationship with one another. The public interest in promoting family stability in *Michelle W.* was the interest in preserving the relationship between the child and her mother's ex-husband. The Court expressly left open the question of the validity of Evidence Code 621 when applied to intervene or prevent the establishment of a relationship between a child and a putative parent. *Michelle W.*, *supra*, 39 Cal.3d at 362 n.4, 216 Cal.Rptr. at 752 n.4 The Court of Appeal in this case closed that door.

While citing the language in *Michelle W.* recognizing the state's "interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability," (Jur.St. B18-B19) the Court of Appeal concluded that "the welfare of Victoria D. would be harmed,

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relationships. Children whose parent's rights are terminated, on the other hand, are unable to benefit from the additional relationships, and they may experience heightened feelings of disloyalty.

The current legal framework of exclusive parenthood ignores children's needs to maintain continuous contact with parent figures, including their natural parents, and underestimates their ability to manage multiple parenting relationships. [Emphasis added].

not protected, if she were permitted to rebut the conclusive presumption of legitimacy."

The Court went on to hold that application of the conclusive presumption "notwithstanding this state's adoption of the Uniform Parentage Act, which rendered illegitimacy to be without any legal effect (*Michelle W.* v. *Ronald W.*, *supra*. 39 Cal.3d at p. 362, fn. 5), this resolution protects Victoria D. "against the social stigma of being branded a child of an adulterous relationship" (Citation omitted.)." (Jur.St. B18) In *Michelle W.*, California's Supreme Court rejected the argument that application of the presumption carried out the valid legislative purpose of protecting children from the stigma of illegitimacy. The Court held that "Even assuming that this argument is correct, this state's subsequent enactment of the "Uniform Parentage Act" (Civ. Code Sec. 7000 et. seq., added by States.1975, ch. 1244, Sec. 11, pp. 3196-3204) has rendered such a consideration to be without any legal effect." The Court noted that the Legislature intended, by enactment of the Uniform Parentage Act, to make "a revolutionary change in the law by abolishing the incidents of illegitimacy and establishing legal equality of children without regard to the marital status of their parents." *Michelle.*, *supra*. 39 Cal.3d at 362 n.5, 216 Cal.Rptr. at 752 n.5.

To the extent that any social stigma remains arising from the marital status of one's parents judicial consideration of the social stigma of illegitimacy was improper.

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for the removal of an infant from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect.

Palmore v. *Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984). The equal protection clause of the fourteenth amendment prohibits discrimination based upon parental marital status. *Gomez* v. *Perez*, *supra*.

Even if the concept of illegitimacy retained meaning in California, failure to presume Gerald's paternity would not render Victoria illegitimate. Michael is a presumed father under Civil Code Section 7004, and clearly initiated this action with the intent of assuming full parental responsibilities.

Cloaked under the question of solicitude for Victoria's potential ostracism as a bastard, is the issue of whether, having engaged in marital infidelity, Carole can use her marriage to deprive Victoria of her established relationship with Michael. During the periods of time in which Carole resided with Michael, both before and after the filing of the paternity action, she showed no particular concern for the actual or apparent integrity of her marriage. The marital relationship grew in significance when Carole fled to New York in avoidance of the California visitation order seeking refuge with Gerald.[30]

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[30] The Los Angeles County Superior Court found Carole in contempt, and jailed her until such time as Victoria was returned to California to enjoy her visitation with Michael. Gerald, who had not appeared in the action until this point, returned Victoria to California and retained counsel. Thereafter he brought the motion for summary judgment which led to his establishment as Victoria's legal father on the basis of his marriage to Carole.

III. ADJUDICATION OF VICTORIA'S PATERNITY AND VISITATION CLAIMS BY CONCLUSIVE PRESUMPTION IN SUMMARY JUDGMENT PROCEEDINGS, WITHOUT PERMITTING VICTORIA TO COMPLETE HER DISCOVERY DEPRIVED HER OF PROCEDURAL DUE PROCESS

Victoria's action to establish the parent and child relationship with Michael, and her action to preserve her relationship with him under California Civil Code Section 4601 were resolved in summary judgment proceedings prior to the completion of discovery. Victoria's motion to compel further discovery was dismissed by the court as it granted summary judgment. At their depositions, Gerald and Carole had asserted that no facts other than those going to the preliminary facts of Evidence Code Section 621 (marriage, cohabitation, non-sterility) were relevant.

Victoria contends that application of the conclusive presumption violated her rights to both procedural and substantive due process. Moreover, to the extent that the conclusive presumption has been rendered rebuttable under certain circumstances (See *Lisa R.* and *Michelle. W., supra.)*, Victoria was entitled to complete discovery and to a hearing on the merits.

> The nature of the required due process turns on balancing the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure. *Santosky* v. *Kramer* 455 U.S. 74, 754, 102 S.Ct. 1388, 1395 (1982).

"The extent to which procedural due process must be afforded . . . is the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 1017-1018 (1970).

As has been argued extensively herein, the interests at stake were profound and fundamental.

Summary judgment proceedings, particularly early in the discovery process, were inadequate to protect Victoria. A young child litigant, represented in the courts through a guardian ad litem, is at a particular disadvantage in summary judgment proceedings, which rely solely upon declarations. While the adults could provide their counsel with factual declarations, Victoria's counsel was dependent upon the findings of the court-appointed expert (whose report she sought) and the fruits of discovery. Victoria's discovery rights were cut off by the court. Had an evidentiary hearing been required, counsel for the child would at least have had the opportunity to challenge the declarations of Carole and Gerald through cross-examination. However, summary judgment proceedings are tried by declaration, and Victoria was deprived of her right to cross-examination.

To the extent that prior case law and the Constitution render Evidence Code 621 rebuttable, all of the surrounding facts and circumstances relating to Victoria's life became relevant. The procedure employed by the Court did not provide an adequate setting for the resolution of issues of this magnitude. Moreover, Victoria had claimed, independent of the determination of her paternity, that she was entitled to preserve her relationship with Michael through visitation rights. Under Civil Code Section 4601, such visitation is permissible if in the child's best interests. Victoria was entitled to a hearing on the merits in this regard. Had she been granted such a hearing, she could have called the expert witness to testify, and inquired, *inter alia* about the comparative impact of the "stigma of illegitimacy" and the loss of a psychological parent. Similarly, Victoria could have introduced expert

testimony about the importance of preservation of young children's attachments, and the expert could have elaborated upon and clarified the findings in his report. Summary judgment proceedings denied Victoria these opportunities.

The State interests in resolving such matters expeditiously are secondary to the child's interests in having them litigated fairly. As this Court noted in *Stanley, supra.*, litigation by presumption is always more efficient than is resolution of disputes on their merits through evidentiary presentations.

CONCLUSION

California has deprived Victoria of the most important right of a child, the right to the continued care, love and guidance of one who stands in the role of both psychological and biological parent. California reached this result in the name of protecting the marital relationship between Carole and Gerald, a relationship which was in no way threatened by occasional visits between Victoria and Michael.

Victoria requests that this Court reverse the judgment, and restore the prior visitation orders.

Respectfully submitted,

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